No. 83-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES, INC.,
Petitioner,

v.

TEAMSTERS JOINT COUNCIL NO. 83
OF VIRGINIA PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that Congress' decision to apply retroactively the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), to employer withdrawals occurring in a limited five-month period prior to the statute's enactment date was neither arbitrary nor irrational.

2. Whether the Court of Appeals erred in ruling that the MPPAA's procedures for assessing, collecting and adjudicating withdrawal liability claims do not violate the due process, jury trial or just compensation guarantees of the Constitution and are not otherwise unconstitutionally vague.

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Respondent, the Teamsters Joint Council No. 83 of Virginia Pension Fund ("Pension Fund" or "Fund") respectfully requests this Court to deny the petition for a writ of certiorari sought by Republic Industries, Inc. ("Republic") to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 9, 1983.

COUNTER STATEMENT OF THE CASE

Without approving or endorsing Republic's Statement of the Case, the Pension Fund believes that it generally contains the facts material to consideration of the questions presented. Consequently, in the interests of brevity, the Pension Fund will do no more than note the following

exceptions and points of clarification to the material facts outlined therein:

1. Republic's description of the MPPAA's dispute resolution procedures is both inaccurate and incomplete. Contrary to Republic's suggestion, a pension fund's withdrawal liability determinations are not immunized from *de novo* review. As the Fourth Circuit properly recognized, an employer may obtain full judicial review of any legal issues initially determined by a fund in the proceeding to enforce, vacate or modify the arbitrator's decision. Appendix to Petition for a Writ of Certiorari ("App.") 22a. Moreover, while the withdrawal liability provisions afford a presumption of correctness both to a fund's initial determinations and the arbitrator's factual findings, these provisions, as the court below also noted, "do little more than allocate the burden of proof to the [employer] and direct that issues which are close be resolved in favor of the nonjudicial dispute resolver." *Id.* Republic also has failed to point out that an employer's failure to utilize the MPPAA's mandatory arbitration procedures renders the withdrawal liability amounts demanded by a pension fund "due and owing" and thus beyond collateral attack. *See* 29 U.S.C. § 1401(b)(1) (Supp. V 1981).

2. While Republic has insisted throughout this case that the aggregate amount of withdrawal liability assessed against it by the various pension funds exceeds its net worth, no record has been established to support the true extent of its aggregate liability. Because Republic chose to bypass the MPPAA's statutory procedures for disputing the claims assessed by each of the funds and instead mounted facial constitutional challenges to the Act, the actual amount of Republic's total withdrawal liability is far from clear.[1] Further, because this suit

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[1] Indeed, Republic apparently has acknowledged that if certain statutory exemptions apply, its aggregate withdrawal liability could be reduced by approximately eighty-five percent. *See* Brief for Amicus Curiae Pension Benefit Guaranty Corporation at 14, n.4 (4th Cir. filed April 18, 1983).

does not encompass an "as applied" constitutional challenge to the MPPAA, the magnitude of Republic's total withdrawal liability simply is irrelevant to the issues presented herein.

3. Republic's allegations that pre-MPPAA federal law imposed no liability upon it for its withdrawal from the Pension Fund in August 1980 simply is incorrect. At that time, multiemployer plans had been subject to intense regulation at least since the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974 and employers withdrawing from such plans were subject to a contingent liability under the statute up to thirty percent of their net worth. *See* 29 U.S.C. § 1364 (1976). Thus, the MPPAA's withdrawal liability provisions did not create a totally new form of liability, but simply modified ERISA to make an employer's liability upon withdrawal fixed, rather than contingent, and remove the net worth liability limitation.[2]

4. Republic's apparent suggestion that it somehow was prejudiced by the Pension Fund's inconsistent statutory determinations likewise is incorrect. Although the Pension Fund, in the first instance, mistakenly offered Republic the option of satisfying the more lenient withdrawal provisions governing "trucking industry plans", Republic never posted the bond or established the escrow required by those provisions and specifically requested by the Fund, but, instead, unilaterally tendered a letter of credit. Furthermore, since Republic avoided any payments on its withdrawal liability during the Fund's re-

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[2] Nor did Republic's collective bargaining agreements contain an express disclaimer limiting its pension liability to the contributions due the Pension Fund thereunder or otherwise holding it harmless for any of the Pension Fund's unfunded vested benefits. *Cf.* Nachman v. Pension Benefit Guaranty Corp., 446 U.S. 359, 364-65 (1980). Thus, contrary to Republic's contention, Congress' imposition of extra-contractual liability upon withdrawal did not contravene any express provision of its collective bargaining agreements.

examination of the trucking industry issue, it actually profited from the Fund's good faith efforts to comply with the statute. Finally, although the Pension Fund *sua sponte* recomputed Republic's withdrawal liability during the proceedings below upon the discovery of an error, that recalculation resulted in a *reduction* in Republic's withdrawal liability. App. 201a-202a. Such action hardly demonstrates improper "bias" on the part of the Pension Fund, particularly since it was under no duty to reduce Republic's liability in light of Republic's failure to utilize the MPPAA's dispute resolution procedures. *See* 29 U.S.C. § 1401(b)(1) (Supp. V 1981).

SUMMARY OF ARGUMENT

Petitioner's challenge to the Fourth Circuit's decision upholding the constitutionality of the employer withdrawal liability provisions of the MPPAA does not merit the attention of this Court. Unlike the Ninth Circuit in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, a case in which this Court noted recently probable jurisdiction,[3] the Fourth Circuit properly recognized that Congress' imposition of liability upon employers who withdrew from multiemployer pension plans in the brief five-month period prior to the MPPAA's enactment constituted a rational, and thus constitutional, means of effectuating a legitimate governmental goal—the protection of millions of Americans who depend upon the financial integrity of multiemployer pension plans for their retirement security. Indeed, in view of the threat to multiemployer plans presented by employer withdrawals while the MPPAA was under final consideration, the retroactive imposition of such liability was not only rational, but essential to protect a carefully crafted scheme fashioned by Congress to meet a problem of national dimensions.

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[3] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 705 F.2d 1502 (9th Cir. 1983), *probable jurisdiction noted*, 52 U.S.L.W. 3308 (U.S. Oct. 17, 1983) (No. 83-245).

The Fourth Circuit's decision to uphold such rational Congressional action against due process challenge is fully consistent with the prior precedents of this Court in the area of retroactive legislation, most notably, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975). Moreover, the analytical framework used by the Fourth Circuit—that derived by the Seventh Circuit in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), from *Usery* and other decisions of this Court—has been employed by virtually every court that has addressed the issue. The mere fact that the Ninth Circuit misapplied *Nachman* in reaching a contrary conclusion presents no compelling reason for granting certiorari in the instant case.

The other constitutional issues raised by Republic—challenges to the MPPAA's procedures for assessing, collecting and adjudicating withdrawal liability claims—clearly do not warrant this Court's attention. As Republic itself admits, not only is there no Circuit conflict with respect to the validity of these procedures, no conflict exists among the district courts. Indeed, more than twenty courts have considered and rejected challenges of this nature. Moreover, even if these questions were otherwise substantial, the instant case provides an inappropriate vehicle for their resolution. Because Republic chose to ignore the MPPAA's dispute resolution mechanism, no record exists as to the actual operation of the vast majority of the procedures Republic has placed in issue. Without such a record, this Court cannot analyze properly the constitutionality of the procedures Congress has fashioned.

ARGUMENT

I. THE COURT OF APPEALS' RETROACTIVITY RULING FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Court of Appeals' Standard of Review Creates No Circuit Conflict And Is Consistent With Principles Established By This Court

In upholding the MPPAA's imposition of retroactive liability, the Fourth Circuit employed the same due process analysis used by the Seventh Circuit in rejecting similar constitutional challenges to ERISA's termination liability provisions in *Nachman v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). Adhering to *Nachman's* four-pronged test, the Court of Appeals concluded that Republic had failed to meet its burden of proving that the retrospective features of the withdrawal liability provision were "irrational." Rather, as the Court found, these provisions represented a "rational" Congressional response to a problem of significant national dimensions, and thus survived due process attack. App. 18a-19a.

The analytic framework employed by the Fourth Circuit is wholly consistent with this Court's prior precedents and, in particular, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975). As the Court there articulated, "legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality." *Id.* at 15. Moreover, as a corollary principle, the Court held that the party complaining of a due process violation has the burden of proving that Congress acted in an arbitrary and irrational way as a prerequisite to obtaining relief. *Id.* Applying this "rationality" standard, the Court had little difficulty in upholding a federal statute which obligated coal mine operators to pay "black lung" benefits to employees who had left their employment long before the statute was passed. In so doing, the Court specifically rejected the operators' contention that the im-

position of liability upon them for past, completed acts violated due process. *Id.* at 18-19.

The Seventh Circuit's analysis in *Nachman* rests squarely upon the reasoning in *Usery*. Indeed, the Seventh Circuit reiterated this Court's admonitions in *Usery* that "Congress has broad latitude to readjust the economic burdens of the private sector in furtherance of a public purpose," and that "[o]nly if Congress legislates to achieve its purpose in an 'arbitrary and irrational way' is due process violated." 592 F.2d at 958, *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15. Moreover, again relying on *Usery*, the Seventh Circuit noted that retrospective legislation also was to be judged by this standard and thus was valid so long as it represented a rational means to achieving a legitimate Congressional purpose. 592 F.2d at 958. In the Court's view, four factors were relevant to the rationality inquiry: (1) the reliance interests of the parties affected; (2) whether the impairment of the private interest is affected in an area previously subjected to governmental regulation; (3) the equities of imposing the legislative burdens; and (4) the provisions of the statute which mitigate the impact of the burdens. *Id.* at 960.

Although Republic strongly argues that reliance on the rationality test is misplaced, it has cited no case subsequent to *Usery* which casts doubt on the continued validity of that holding or on *Nachman's* interpretation of the standards enunciated therein.[4] Certainly, nothing in *Al-*

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[4] Indeed, Republic's claim of inconsistent precedents relies primarily on Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) and Untermyer v. Anderson, 276 U.S. 440 (1928), two cases decided over forty years before *Usery* during the "heyday of substantive due process." S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867, 874 (C.D. Cal. 1982). To the extent these decisions retain any vitality, they generally have been limited to their specific facts. *See* United States v. Darusmont, 449 U.S. 292, 299 (1981) (*Untermyer* limited); Usery v. Turner Elkhorn Mining Co., 428 U.S. at 19 (*Alton* distinguished). The contingent liability imposed on employer withdrawals under pre-MPPAA law further distinguishes *Untermyer*.

lied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) repudiates the *Usery/Nachman* analysis. Indeed, if anything, *Spannaus* underscores the propriety of the four-factor rationality test devised by the Seventh Circuit.[5] Moreover, in decisions rendered both before and after *Usery*, the Court has upheld legislative enactments which were retroactive in impact. *See United States v. Darusmont*, 449 U.S. 292 (1981); *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *United States v. Hudson*, 299 U.S. 498 (1937). These cases illustrate with particular clarity the principle that Congress may legislate retroactively when necessary to effect a rational and legitimate legislative purpose.[6]

The *Usery/Nachman* rationality test not only comports fully with this Court's precedents, but also has been utilized by virtually every court to consider challenges to the constitutionality of the withdrawal liability provi-

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[5] While this Court in *Spannaus* invalidated Minnesota's Private Pension Benefits Protection Act under the Contracts Clause, it reaffirmed the "presumption favoring legislative judgments," and looked to the very factors later adopted by the *Nachman* court to judge the validity of the statute: the nature of the employer's reliance interests, 438 U.S. at 245, the societal problem sought to be remedied by the legislation, *id.* at 246, whether the law operated in an area subject to previous state regulation, *id.* at 250, the equities in relation to the parties affected by the legislation, *id.* at 247-50, and the presence of mitigating factors, if any. *Id.* at 247. Thus, *Spannaus* hardly represents a diminution or modification of the principles outlined in *Usery* or *Nachman*.

[6] It therefore is hardly surprising that the Fourth Circuit found unworthy of comment Republic's contention, supported solely by cases arising in the criminal context, that Congressional enactments properly could be given retroactive application only in extraordinary circumstances. While Congress may lack authority to legislate retroactively in the criminal area, its ability to do so in the civil context, and, in particular, the economic and social welfare areas, is well-settled.

sions, including those few which have struck down their retroactive effective date.[7] Thus, far from creating a disabling conflict within the Circuits requiring prompt resolution by this Court, the opinion below applied a standard of review which has received unanimous endorsement.

B. The Ninth Circuit's Misapplication of the *Nachman* Standards Provides No Basis for Granting Review In This Case

The mere fact that the Ninth Circuit misapplied the *Nachman* test does not present adequate grounds for granting the petition in this suit. While the Ninth Circuit's decision to invalidate the MPPAA as applied to preenactment withdrawals necessitated action by this Court,

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[7] *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., *supra*; Sibley, Lindsay & Curr. Co. v. Bakery, Confectionery & Tobacco Workers Int'l Union, 566 F. Supp. 32 (W.D.N.Y. 1983); Board of Trustees, Western Conference of Teamsters Pension Trust Fund v. J.N. Ceasan, 559 F. Supp. 1210 (N.D. Cal. 1983); Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp 523 (W.D. Wa. 1982); Coronet Dodge, Inc. v. Speckmann, 533 F. Supp. 518 (E.D. Mo. 1982); Fur Manufacturing Industry Retirement Fund v. Lazar-Wisotzsky, Inc., 550 F. Supp. 35 (S.D. N.Y. 1982); Textile Workers Pension Fund v. Standard Dye Co., 549 F. Supp. 404 (S.D.N.Y. 1982); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982); S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867 (C.D. Cal. 1982); I.U.E. Pension Fund v. Erie Universal Products Corp., 4 EBC 1357 (D.N.J. 1983); Washington Star Co. v. International Typographcial Union Pension Fund, 4 EBC 1145 (D.D.C. 1983); Victor Construction Co. v. Construction Laborers Pension Trust, 3 EBC 1765 (C.D. Cal. 1982); Ells v. Construction Laborers Pension Trust, 3 EBC 1449 (C.D. Cal. 1982); Warner-Lambert Co. v. United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan, —— F. Supp. ——, No. 82-1080 (E.D. Pa. Aug. 10, 1983); Republic Industries, Inc. v. New England Teamsters & Trucking Pension Fund, —— F. Supp. ——, No. 82-2551 (D. Mass. Aug. 3, 1983); Transport Motor Express, Inc. v. Central States, Southeast & Southwest Areas Pension Fund, —— F. Supp. ——, No. 81-C-4535 (N.D. Ill. May 19, 1983); Speckmann v. Paddock Chrysler Plymouth, Inc., —— F. Supp. ——, No. 82-0888-C(c) (E.D. Mo. May 6, 1983).

review of the Fourth Circuit's ruling is unnecessary since that Court not only applied the proper legal standards, but also reached the correct result.

In assessing the rationality of the MPPAA's retroactive impact, the Court below took due account of the salutary Congressional goals served by the withdrawal liability provisions—the protection of an employee's expectation of receiving his vested pension benefits. Moreover, the Court properly recognized that enactment of the withdrawal liability provisions was necessary to assure the availability of funds to provide those benefits at retirement, since multiemployer funds then were faced with a financial crisis attributable largely to employer withdrawals.[8] In the Court's view, Congress properly could conclude that these considerations far outweighed any countervailing expectations of limited liability possessed by employers, particularly since those expectations already had been eroded by the extensive prior regulation of multiemployer plans and the contingent withdrawal liability imposed by ERISA itself.

When Congress' decision to impose liability upon employers who withdrew in the brief five-month period prior to the MPPAA's enactment is considered in this context, the rationality of that judgment is self-evident. There clearly is little difference in the effect of with-

[8] As the Court of Appeals noted, the withdrawal liability provisions were spawned in part by a report prepared by the Pension Benefit Guaranty Corporation which was submitted to Congress in July, 1978. This report established that a substantial number of multiemployer plans were experiencing financial difficulties which could result in imminent plan terminations, and thus jeopardize the retirement security of millions of Aemricans. *See* Multiemployer Study Required by P.L. 95-214 (1978). Further, the Report concluded that employer withdrawals were a primary cause of these financial problems. Confronted with the decision of who should bear the economic burden of unfunded pension liability left by withdrawing employers, Congress determined that the employers themselves, "the parties whose conduct threatens the harm," were the logical choice. Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. at 1046.

drawals occurring shortly before and shortly after the statute's enactment; both affect plan stability in precisely the same way, and, in the absence of some remedial measure, unfairly burden non-withdrawing employers and ultimately plan participants themselves with the responsibility of absorbing the shortfall. *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. at 1055. Moreover, as the Court of Appeals observed, Congress was concerned that, without a retroactive effective date, opportunistic employers would be encouraged to take advantage of the inherent delays in the legislative process and withdraw from multiemployer plans, particularly since its deliberations on this issue were well publicized. Such withdrawals not only would have exacerbated the very problems that Congress was attempting to remedy in the MPPAA, but also could have rendered the solution it had arrived at ineffective. As the Fourth Circuit correctly held, Congress' decision in the face of this dilemma to impose a brief period of retroactive liability could not be deemed "irrational". App. 15a-16a. Indeed, it appears to have been essential to protect the carefully crafted legislative solution Congress had fashioned.[9]

II. THE COURT OF APPEALS' HOLDING ON REPUBLIC'S REMAINING CONSTITUTIONAL ISSUES CREATES NO CIRCUIT CONFLICT AND FAILS TO PRESENT SIGNIFICANT ISSUES JUSTIFYING REVIEW

Republic's constitutional challenges to the MPPAA's procedures for assessing, collecting and adjudicating with-

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[9] But for the contrary result reached by the Ninth Circuit, the decision in this case would provide virtually no justification for review in this Court. Nonetheless, should the Court determine that the retroactivity issue presented herein warrants further scrutiny, the Fund would urge that this case be consolidated with *Gray* for briefing and argument on the merits. Joint consideration of these conflicting decisions, the only appellate decisions to date which address the constitutionality of the MPPAA's retroactive effective date, cannot help but insure a more complete exposition of the retroactivity issue, and thus aid the Court in its analysis of this question.

drawal liability claims clearly do not warrant this Court's attention. As petitioner concedes, these same claims of constitutional infirmity have been raised without success in "scores of cases" in the lower courts.[10] Thus, no conceivable conflict exists which would justify this Court's review.

Nor, as this universal agreement suggests, do petitioner's constitutional challenges present substantial constitutional questions. As the Court of Appeals recognized, it is too late in the day to argue that compulsory arbitration, per se, denies due process of law. Congress may permissibly delegate adjudicative functions to an arbitrator where, as here, the arbitrator operates within a discernible statutory framework and judicial review ultimately is available. *See Andrews v. Louisville & NRR*, 406 U.S. 320, 322 (1972); *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, 693 F.2d 290, 294-95 (3d Cir. 1982). *See also First Jersey Securities v. Bergen*, 605 F.2d 690, 697 (3d. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

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[10] *See, e.g.*, Board of Trustees, Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan, 559 F. Supp. 1210 (N.D. Cal. 1983); Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523 (W.D. Wa. 1982); Coronet Dodge, Inc. v. Speckmann, 553 F. Supp. 518 (E.D. Mo. 1982); Fur Mfg. Indus. Retirement Fund v. Lazar-Wisotzsky, Inc., 550 F. Supp. 35 (S.D.N.Y. 1982); Textile Workers Pension Fund v. Standard Dye Co., 549 F. Supp. 404 (S.D.N.Y. 1982); Peick v. Pension Benefit Guaranty Corp., 539 F. Supp. 1025 (N.D. Ill. 1982); S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867 (C.D. Cal. 1982); Washington Star Co. v. International Typographical Union Pension Fund, 4 EBC 1145 (D.D.C. 1983); Victor Construction Co. v. Construction Laborers Pension Trust, 3 EBC 1765 (C.D. Cal. 1982); Ells v. Construction Laborers Pension Trust, 3 EBC 1449 (C.D. Cal. 1982); Warner-Lambert Co. v. United Retail & Wholesale Employees Teamsters Local No. 115 Pension Plan, —— F. Supp. ——, No. 82-1080 (E.D. Pa. ug. 10, 1983). *See also* Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund, 534 F. Supp. 1340 (E.D. Pa.), *rev'd on other grounds*, 693 F.2d 290 (3d Cir. 1982).

Moreover, neither the method of initially computing an employer's withdrawal liability nor the presumptions of correctness afforded both to the fund's determination and the arbitrator's award violate due process. As the Fourth Circuit recognized, these presumptions do little more than allocate the burden of persuasion to the employer, App. 22a, and are not unlike the traditional deference given to administrative decisions and arbitration proceedings which later come before a court for review. And, as this Court recently observed, "when Congress creates a statutory right, it clearly has the discretion in defining that right to create presumptions, or assign burdens of proof or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858, 2878 (1982).

Petitioner's generalized claim of institutional bias on the part of the Trustees who make the initial determination is equally without merit. Although these Trustees represent fiduciaries to the Fund and its participants and beneficiaries, this fact, in and of itself, is insufficient to support a claim of unconstitutional bias. Rather, as this Court recently had occasion to note, "[s]uch assertions require substantiation before they can provide a foundation for invalidating an Act of Congress." *Schweiker v. McClure*, 465 U.S. 188, 196 n.10 (1982); App. 21a, n.13.

Petitioner's Seventh Amendment and vagueness challenges likewise are too insubstantial to warrant review. As this Court has observed time and again, the right to jury guarantee applies only to suits which existed at common law and not to cases, such as this, involving Congressionally created "public rights." *See Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 458 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1931). Petitioner's vagueness challenge could succeed *only* if Republic could demonstrate that "the law is impermissibly

vague in *all* of its applications." *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 490 (1982). As the Court of Appeals correctly observed, however, the MPPAA provisions cited as facially vague, read in context and in conjunction with the legislative history of these provisions and applicable regulations, provide sufficient guidance to withstand constitutional attack. App. 27a.

Lastly, Petitioner has failed to demonstrate that its claims that the withdrawal liability provisions either constitute a taking without just compensation or an unconstitutional deprivation of assets without a prior impartial hearing raise significant constitutional questions. Even assuming *arguendo* that Republic could timely raise the taking issue,[11] no unconstitutional taking can occur in instances, such as this, where the alleged interference arises from a public program which merely adjusts the benefits and burdens of economic life. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Nor does the requirement that employers make payments while they are contesting their withdrawal liability in compulsory arbitration deprive them of property in violation of due process of law. Not only is there no deprivation of property, since the employer may refuse to make these payments, but, as the Court of Appeals correctly found, a hearing prior to the implementation of the MPPAA payment procedures simply is not mandated by the due process clause. App. 23a-24a.

Even if these constitutional challenges otherwise presented substantial issues, this is an inappropriate case in which to resolve them. Republic purposely failed to avail itself of the dispute resolution procedures established by the MPPAA for contesting the Pension Fund's withdrawal liability assessment, and, instead, mounted a facial

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[11] As the Fourth Circuit noted, it is "questionable" as to whether Republic properly could assert its "taking" issue since that issue was not raised in the district court. App. 25a.

assault on the entire statutory scheme. As a result, no record exists as to the actual effect of these procedures. As this Court has consistently ruled, however, parties cannot legitimately raise complaints about the manner in which a federal statute has been or will be applied in specific circumstances without prior recourse to such procedures and the establishment of a factual context in which to pass on the constitutional challenges. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 101 S.Ct. 2352, 2371 (1981); *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309 (1967). Thus, petitioner's failure to utilize the MPPAA's arbitration provisions have precluded those procedures from being placed in a posture appropriate for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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